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No. 84-620

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH, *et al.*,
Petitioners

v.

NEW JERSEY STATE BOARD OF HIGHER EDUCATION, *et al.*,
Respondents

REPLY BRIEF FOR PETITIONERS

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ARGUMENT
The State Is Incorrect In Its Analysis Of The Religion Clause Issues

The State first argues that what it calls "licensure" does not impair Shelton's free exercise of religion or create excessive state-church entanglements. New Jersey "licensure" of a degree-granting college is something quite different from a bare permit, granted upon the initial passing of a test and almost automatically renewable. Contrary to what the State contends (Brief In Opposition, 8), licensure of such a college in New Jersey *does* "result in the State's total dominion over the college." It pertains to all of its essential functions: "instructional purpose; administrative organiza-

tion; finances; education programs; faculty; library; student body; and physical facilities." Brief In Opposition, 2.

But to get away from the Church's contention that this total dominion infringes upon its free exercise, the State makes the claim that

> "The regulations require *only* that Shelton provide the Board with information sufficient to assess the educational competency of the school."

Brief In Opposition, 8. (Emphasis supplied). In other words, the comprehensive regulatory scheme is really not an intrusive scheme at all: it is aimed "only" at getting "information" (albeit an exercise in information-gathering would appear pointless, unless consequences in terms of governmental action were to follow the assessment involved).[1] These comments are called for:

1. If licensure does *not* impose "total dominion" and is a mere means for getting "information" for evaluation purposes, *how does licensure satisfy a compelling state interest?* The Court's attention is now directed to Page 10 of the

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1. Judge Gibbons, speaking for the Third Circuit at an earlier stage of the case, stated: "The requirement of a statement of purpose is not merely informational, for the regulation dealing with educational programs provides that '[t]he educational program shall reflect and support the purposes of the institution' and 'shall include course work and other activities extending over a sufficient period of time and in sufficient intensity to fulfill the purposes of the institution. N.J.A.C. 9: 1-1.5(a)1, 2. Thus on the face of the regulations it would appear that in order to obtain a license, an institution with a religious commitment such as Shelton's must submit to the Board a statement of its religious purpose, as well as evidence that the various elements of its institutional life are structured to support that purpose, and must submit to the Board's judgment the question whether its educational program reflects and supports that purpose. Facially, therefore, the Board's licensing regulations suggest a very high degree of state entanglement in Shelton's religious affairs. And the 1916 law unambiguously prohibits instruction leading to a diploma or degree, even in theology, absent a license." (A-81).

Brief In Opposition where the state says, in justification of its licensure program:

> *"The public stake in education has never been more evident, for today higher education is essential for the survival of man himself . . ."*

(Emphasis supplied). If that is true, then the State had better *not* content itself with mere information-getting or evaluation. If "the survival of man himself " is what is involved, then the State should — indeed, *must* — regulate *to the hilt*. The State argues a contradiction: (a) that no intrusion upon a college's religious liberties are imaginable under the very "minimal" standards; (b) that a compelling governmental interest in the very survival of man necessitates the imposition of regulation.

2. Therefore, either the regulatory scheme is excessively entangling or else it cannot be said to be justified by a compelling state interest.

3. If the Court is not to abandon what the Court has held concerning church-government entanglement (in *Walz* [2], *Lemon*[3], *Catholic Bishop*[4] and related cases) and concerning compelling state interest and least restrictive means (in *Sherbert*[5], *Yoder*[6], *Lee*[7], *Thomas*[8] and other cases), it will have to rule, upon this record, that here indeed a totally invasive regulatory system is imposed on a church institution, inhibitive of the free exercise of its educational ministry according to its religious dictates. The Court will next need to examine the record to determine — not whether, in general, the regulatory scheme is justified by a compelling societal interest — but whether its application *to this church institution* is so necessitated *and*

2. *Walz v. Tax Commission*, 397 U.S. 664 (1970).
3. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
4. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).
5. *Sherbert v. Verner*, 374 U.S. 398 (1963).
6. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
7. *United States v. Lee*, 455 U.S. 252 (1982).
8. *Thomas v. Review Board*, 450 U.S. 707 (1981).

whether society's interest in protecting the public, *in this case*, will be sufficiently ensured without attempting to make Shelton part of the State "system"[9] of higher education.

4. The record flatly contradicts the State's claim that the imposing of its comprehensive regulatory scheme on Shelton College is necessitated by a supreme public interest. The State totally failed to bear its burden of proof in respect to that issue (which is a factual issue). On the other hand, abundant testimony (including admissions by State witnesses) deprives the State of any credible support for its claim that its failure to regulate Shelton would be (a) destructive of good education at Shelton, (b) destructive of good education anywhere else, (c) produce a "domino" effect by way of the proliferation of fly-by-night colleges, or (d) be deceptive to adult consumers of higher education.

5. The point ignored by the State, but the point upon which, principally, this case turns, is whether the realization of the societal interest in encouraging good education and discouraging educational fraud is not, in the case at bar, reasonably assured by the very nature of the religious enterprise which is Shelton. Here the State expressed concern that because "[r]eligious oriented colleges and universities comprise a significant proportion of the institutions of higher learning" (Brief In Opposition, 12), a decision in favor of Shelton would permit those other institutions to become unregulated. While nothing in the record supports the view that New Jersey's regulatory scheme in fact assures even minimal quality education, Shelton cannot in any event be lumped together with "religious oriented colleges". Shelton, the record shows, is radically different from denominational colleges in New Jersey. It is more precisely akin to the kind of strict, religion-inculcating institution examined by the Court in *Lemon v. Kurtzman*, *supra*.

The State's accompanying point, that "carving out a religious exception to the State's licensure scheme would ef-

9. N.J.S.A. 18A: 3-13.

fectively destroy the legislative scheme" (Brief In Opposition, 12) is simply testimony by counsel, as is the non-record assertion that "a common practice of diploma mills is to use names suggesting religious affiliation." *Ibid*. The record in this case is that Shelton is *not* a diploma mill, but that there *are* what can best be described as "diploma mills" operating under New Jersey licensure. It is extreme hyperbole to assert that New Jersey's licensure scheme — to which no institution except Shelton has voiced a religious objection — would be effectively destroyed were Shelton College permitted to continue to award a Shelton College degree to adults who desire a Shelton College education and are willing to conform themselves to the religious and moral regimen (see A-183) of a unique church institution.

6. The State's analysis of the "entanglement" issues presented by the Church is substantially incorrect. The State seeks to escape the charge that its licensure scheme is excessively entangling by four arguments: (a) that licensure simply involves no comprehensive and continuing state surveillance (Brief In Opposition, 13); (b) that it is substantially the same as the Maryland licensure scheme which, in *Roemer v. Board of Public Works*, 426 U.S. 736 (1976), had "the Court's implicit approval" (Brief In Opposition, 14); (c) that any specific application of the New Jersey regulations is purely speculative (*ibid.*); and (d) that, anyhow, the regulations do not involve the State in the "religious" affairs of Shelton College.

In brief response:

(a) If no comprehensive and continuing state surveillance is involved, then (as has been seen) it cannot be imagined that the State's "overriding interest in seeing that [the universal currency of higher education] is not devalued by counterfeiters or incompetent bankers" (Brief In Opposition, 13) can be protected. It cannot be pretended that statutes protecting banks do not require intimate governmental "entanglements" with them.

(b) The *Roemer* case is inapplicable. As the Court there stressed, the Maryland licensure statute did not result in

excessive entanglement between church and state in large part because of the *relatively secular* nature of the Catholic colleges there involved. Nothing could form a more vivid contrast than by laying, side by side, the Court's description of those colleges (see *Roemer, supra*, at 755-759) and the finding which all the courts below have made respecting the nature of Shelton College. As summarized by the Supreme Court of New Jersey:

> "Shelton College is an institution of higher education operated by the Bible Presbyterian Church as part of the church's religious mission. Members of this fundamentalist Christian church believe that every aspect of their lives, including education, must be governed by their faith. Shelton's teachers and students believe that their presence at the college is for the purpose of preparing themselves and others to undertake missions that their Lord calls upon them to perform. Religion pervades Shelton College. Every academic subject is taught from a Christian fundamentalist perspective and students must conform their behavior to religiously derived codes of conduct. Shelton College is a school of approximately 30 students, but those who attend it cherish its mission."

A-27.

(c) The State is misleading when it tells the Court that whether the regulations will be applied in any unconstitutional manner is speculative. There is nothing speculative about the requirement to take a license, and a bedrock "given" in this case is the Church's refusal, on religious grounds, to accept what it considers to be a governmental permit to carry out its educational ministry. As to the regulations, these are inseparable from the license. There must be total conformity to the "minimum standards" which cover every aspect of the life of the church institution. The problem which the regulations pose (apart from the bare taking of the license) is that a church's own judgments as to how it shall carry out its institutional life (the life of an educa-

tional ministry) is made subject to the review and judgment of outsiders, not of the faith. Government becomes a participant in the church ministry in its every aspect.

(d) To avoid this conclusion, the State attempts what, since *Lemon v. Kurtzman*, is an impossibility: the bifurcating of a pervasively religious educational institution which is an "integral part of the religious mission" of its sponsoring church (*Lemon, supra*, at 616), into "secular" and "religious" components. That is what the State attempts here when it says:

> ". . . there is no possible basis for assuming that the Board will overstep its legal bounds and intrude upon Shelton's religious affairs in the licensure process."

Brief In Opposition, 15. There *are* no "legal bounds" separating the "secular" from the "religious", in an institution such as Shelton.[10] Shelton is a church organism, a thoroughly religious enterprise. The State says that the issuance by Shelton of a bachelor's degree "is not a religious function or practice of the school, and that all bachelor's degrees are somehow "secular". (Brief In Opposition, 8). But the State mistakes what a degree is. It is a title conferred upon an individual and, as such, may be of secular significance or of religious significance. The *awarding* of a degree by Shelton College is the culmination of a process within a church institution in which it exercises a religious and moral judgment that an individual is fit to bear the title in question. The fact that a church selects a title ("bachelor"), which is also employed by secular institutions of higher education, cannot disqualify the Church from using that

10. The State, in its references to Shelton's courses in Business Administration, Natural Science, etc., is contradicted by the Supreme Court of New Jersey: "Every academic subject is taught from a Christian fundamentalist perspective." A.27. In *Lemon*, this Court held that the teaching of mathematics, modern foreign languages, physical science and physical education, could not be cordoned off as "secular" educational activities in a church school where, as here, religion is pervasive.

title. It cannot credibly be said that, if the State of New Jersey is deemed to have a franchise power over degree issuance in New Jersey, that power extends even to a uniquely religious institution such as Shelton.

Respectfully submitted,

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